

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAPITAL BONDING CORPORATION	:	CIVIL ACTION
	:	
v.	:	
	:	
NICOLETTE WILSON	:	NO. 00-CV- 3828

MEMORANDUM AND ORDER

J. M. KELLY, J.

AUGUST , 2000

Presently before the Court is a Complaint for Confession of Judgment filed by the Plaintiff, Capital Bonding Corporation (“Capital”). Capital seeks a judgment of \$107,600.00 from the Defendant Nicolette Wilson (“Wilson”) plus costs of suit as provided in the Security Agreement, Suretyship and Confession of Judgment (“Agreement”) executed by both parties. For the following reasons, judgment will be granted in favor of the Plaintiff in the amount of \$91,100.00.

I. BACKGROUND

In June of 1996, Wilson executed the Agreement with Capital, pursuant to which she agreed to act as an indemnitor and surety for a bail bond posted by Capital for her son, Paul Smith (“Smith”). According to the terms of the Agreement, Wilson agreed to pay the full \$85,000.00 amount of the bond plus expenditures resulting if Smith failed to appear in court within the time ordered. Also included in the Agreement was language indicating the signatory would pay attorney’s fees equaling twenty percent of the total unpaid principle amount if Smith should fail to appear in court.

On October 28, 1996, Smith failed to appear as ordered in the Atlantic County, New Jersey court. Capital then paid the amount of Smith’s forfeited bond to the New Jersey State bail

fund. In February 2000, after numerous attempts to recover the amount of bail and other expenses from Wilson, Capital sent notice of a default judgment based on the terms of the Agreement, notifying Wilson that she owed the total amount of the principal bond, expenses and attorney's fees, all totaling \$107,600.00.¹ Capital is presently seeking to collect this amount from Wilson pursuant to their Agreement.

II. DISCUSSION

When deciding a complaint for confession of judgment, the Court must exercise its power fairly, as confession of judgment is a tool that prevents the debtor from presenting his case in court. See PNC Bank v. Bolus, 655 A.2d 997, 1000 (Pa. Super. Ct. 1995). In the present situation, Wilson has confessed judgment in favor of Capital. Nonetheless, in ruling on such a matter, because the bail bond is a contract between the parties, the Court must analyze the Agreement according to the governing law of contracts. See United States v. Martinez, 613 F.2d 473, 476 (3d Cir. 1980); see also United States v. Martinez, 151 F.3d 68, 72 (2d Cir. 1998), cert. denied, 526 U.S. 1020 (1999). Because the Court is sitting in diversity and ruling on a contract formed in Pennsylvania, the Court will apply Pennsylvania law. In applying this law, the Court finds the attorney's fee clause in the Agreement to be both procedurally and substantively unconscionable. Accordingly, it will be applied in a limited manner so as to avoid an unfair result.

¹ Capital asserts that it is owed \$85,000.00 for the principal bond amount, \$1,100.00 for expenses and twenty percent of the principle amount for attorney's fees, or \$17,000.00. These itemized expenses, however, come to a total of only \$103,100.00, not the \$107,600.00 Capital asserts in its Complaint that it is owed. Because there is no apparent basis for the Plaintiff's request for an additional \$4,500.00, it is denied.

A. Procedural Unconscionability

Procedural unconscionability exists where an agreement is reached using unclear language or “fine print” terms that are not expected by the party whose assent is necessary for the agreement. See Harris v. Green Tree Fin. Corp., 183 F.3d 173, 181 (3d Cir. 1999); Germantown Mfg. Co. v. Rawlonsen, 491 A.2d 138, 145-46 (Pa. Super. Ct. 1985). In this case, it is clear that Wilson would not have expected that attorney’s fees of twenty percent of the principle amount of the bond would be owed to Capital in the event that Smith did not appear in court. The clause containing the stipulation regarding the cost of the attorney’s fees is not only in the second of four documents signed in succession by Wilson, but the language regarding the attorney’s fees is not specially marked or indicated in the Agreement.

Furthermore, procedural unconscionability may be found where parties to a contract have unequal bargaining power. See Harris, 183 F.3d at 181; Moscatello v. Pittsburgh Contractors Equip. Co., 595 A.2d 1190, 1196-97 (Pa. Super. Ct. 1991). Nothing in the record indicates that at the time the Agreement was signed Wilson and Smith had an attorney present to interpret its terms. Additionally, there is no indication that Wilson was an experienced party to such agreements or that she would have expected a clause regarding fees other than the principal amount of the bail and expenses to be owed Capital in the event that Smith did not timely appear in court. For this reason, the Court finds the clause to be procedurally unconscionable.

B. Substantive Unconscionability

Substantive unconscionability is present in a contract where the terms are grossly favorable to one side. See Harris, 183 F.3d at 181. In the instant case, the Agreement provided that attorney’s fees in the amount of twenty percent of the principal amount of bail would be

charged to any surety in the event that the criminal defendant did not appear in court at the requisite time. Attorney's fees are common in such contracts, but a rate of twenty percent in this case is unreasonable. Recently, the United States Court of Appeals for the Third Circuit adopted a test to determine whether attorney's fees are reasonable. See Ryan v. Butera, Beausang, Cohen & Brennan, 193 F.3d 210, 214 (3rd Cir. 1999). The Court must determine first whether the attorney's conduct "had resulted in a fee that enriched the attorney at the client's expense" and second "whether that enrichment violated the court's 'sense of fundamental fairness and equity.'" Id. (quoting McKenzie Constr., Inc. v. Maynard, 823 F.2d 43, 44 (3d Cir. 1987)). Doubtless, a fee totaling twenty percent of the principal bond is an unreasonable charge under these criteria. In the present case, Wilson would owe an additional \$17,000.00 for attorney's fees alone when it is likely that the attorney's only duty was to send notice of default and draft the instant complaint. Accordingly, the Court finds the attorney's fee clause to be substantively unconscionable as well.

In finding this clause unconscionable, the Court may refuse to enforce the contract entirely, enforce the remainder of the contract without the unconscionable clause or limit the application of any unconscionable clause so as to avoid an unreasonable result. See, e.g., Antz v. Gaf Materials Corp., 719 A.2d 758, 762 (Pa. Super. Ct. 1998), appeal denied, 739 A.2d 1054 (Pa. 1999). In the instant case, the Court finds that justice would be best served by limiting the application of the attorney's fee clause so as to avoid the unconscionable result that would take place if Wilson was required to pay Capital's attorney's fees as stipulated in the Agreement. In light of the minimal work likely performed in this matter, the Court finds \$5,000.00 in attorney's fees to be reasonable.

III. CONCLUSION

In light of the foregoing discussion, Capital's Complaint for Confession of Judgment is granted in the amount \$91,100.00. This amount is comprised of the \$85,000.00 bond, \$1,100.00 in fugitive fees and \$5,000.00 in attorney's fees. The parties shall have until September 11, 2000 to file objections, if any, to the amounts herein ordered. Additionally, Capital shall provide Wilson with a copy of this Memorandum and Order on or before September 1, 2000.

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ORDER

AND NOW, this day of August, 2000, in consideration of the Complaint for Confession of Judgment (Doc. No. 1) filed by the Plaintiff, Capital Bonding Corporation and the Praecipe for Assessment of Damages and Confession of Judgment (Doc. No. 2) filed by the Defendant, Nicolette Wilson, it is ORDERED that judgment is ENTERED in favor of Capital Bonding Corporation and against the Defendant, Nicolette Wilson, in the amount of \$91,100.00. The parties shall have until September 11, 2000 to file objections, if any, to the amounts herein ordered. Additionally, Capital shall provide Wilson with a copy of this Memorandum and Order on or before September 1, 2000.

BY THE COURT:

JAMES McGIRR KELLY, J.